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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1923

JAMES O. EASTLAND, ET AL., *Petitioners*

v.

UNITED STATES SERVICEMEN'S FUND, ET AL.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL., *Petitioners*

v.

PEOPLES' COALITION FOR PEACE AND JUSTICE, ET AL.,

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL., *Petitioners*

v.

PROGRESSIVE LABOR PARTY, ET AL.,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

This reply brief deals with certain arguments in the Brief in Opposition concerning (1) the propriety of petitioners being represented by private counsel, (2) the precedent for and scope of the decision below,

(3) respondents' First Amendment claim, and (4) the existence of a "live" controversy.

1. Respondents argue that the Members of Congress and their staff, as petitioners, are not properly before this Court because they are represented by private counsel rather than the Solicitor General; they urge this Court to infer that the Solicitor General is not representing petitioners because he decided their case lacks merit.[1]

Respondents' assertions in this regard are totally refuted in the August 22, 1974, letter from Solicitor General Robert H. Bork, which has been distributed to the Members of the Court. Since the matter involves the internal practice and policy of the Office of the Solicitor General, we rely upon that letter. We add only that it has never been thought that the Executive Branch, through the Department of Justice, controls the Legislative Branch by having exclusive authority to represent Members of Congress in litigation without their agreement.[2] Members of Congress are not "the United States, an agency, or officer thereof" within the meaning of 28 U.S.C. § 516, see *Steele* v. *United States,* 267 U.S. 505 (1925), and that statute has never been taken to mean that a Congressman is barred from being represented by private counsel simply because the United States is "interested" in the litigation. Otherwise, this Court should not have decided cases such as those cited in the Solicitor General's letter or, for that matter,

[1] Brief in Opposition, pp. 4-5, and note *, pp. 5-6.

[2] Indeed, during oral argument in the court below one of the judges was a "little curious" about how the Attorney General could ever act as counsel for Members of Congress. Transcript of Oral Argument, p. 38.

Powell v. *McCormack,* 395 U.S. 486 (1969), or *Gravel* v. *United States,* 408 U.S. 606 (1972).[3]

2. Respondents point to *Perlman* v. *United States,* 247 U.S. 7 (1918), in an attempt to show that here the court of appeals announced no new constitutional doctrine.[4] If *Perlman* were controlling, as respondents suggest, one would expect that the majority opinion below relied upon it. But *Perlman* is not even cited in the opinion[5] and the reason is apparent.

Perlman in no way involved judicial intrusion into the legislative process,[6] which is the central concern in this case, a concern even the majority of the court of appeals recognized when it accurately viewed the issue here as a "fundamental constitutional question of grave import to which the Supreme Court has not yet given an explicit answer" (Pet. App. 3a). The Court in *Perlman* obviously never discussed the Speech

[3] Private attorneys represented the Congressional plaintiff and the Congressional defendants in *Powell*. In *Gravel*, private counsel represented Senator Gravel while the Solicitor General represented the United States. In cases such as *Powell* and *Gravel*, respondents' argument leads to the absurd result that the Department of Justice should have represented both sides in the case.

[4] Brief in Opposition, pp. 13-18.

[5] The district court in the *Eastland* case had cited *Perlman* without discussion (Pet. App. 73a); and in their appellate brief, respondents in *Eastland* did no more than quote this portion of the district court's opinion (Brief, at pp. 9, 15). Respondents in the House Committee cases did not even cite *Perlman* in their appellate brief.

[6] In *Perlman* the owner of certain materials previously impounded as exhibits in a civil case moved to enjoin production of the materials by the clerk of the court for use by a grand jury, invoking his privilege against self-incrimination. This Court upheld Perlman's right to intervene and held that the denial of his motion was appealable, but decided on the merits that he had no right to prevent the documents from being turned over.

or Debate Clause principles set forth in our Petition, at pp. 11-16, which show why we believe that the instant case was wrongly decided. Respondents have chosen to ignore our arguments in this regard by relying upon *Perlman* and claiming that the decision below merely echoes this Court's decisions of the past.

Beyond this, respondents seek to diminish the importance of this case by contending that the novel rule adopted by the court below reaches only "those situations where the legislature attempts to evade court review by issuing subpoenas to third parties who cannot be expected to run the risk of contempt to protect the constitutional rights of the real party in interest * * *."[7] But the subpoenas here were in no way "indirect": they were issued to the owners and custodians of the documents involved. None of the courts below found any attempt "to evade court review" and there is nothing in the record to support such an assertion.

3. In regard to their First Amendment claim, which we discussed in our Petition, at pp. 16-19, respondents do no more than assert that the subpoenaed bank records are "the functional equivalent of membership lists" and therefore are immune from discovery (Brief in Opp., p. 18). Respondents fail to deal with the arguments in our Petition (pp. 17-19) that the subpoenas were directed not at USSF's records but at the records of the bank and that it is commonplace for such bank records to be discovered during investigative inquiries.[8]

[7] Brief in Opposition, p. 18.

[8] Congress has required banks to retain their records for a certain number of years. See *California Bankers Ass'n.* v. *Schultz*, 94 S.Ct. 1494 (1974).

The bank's records relating to USSF are already known to the bank's employees. The records certainly could be properly subpoenaed by a federal grand jury during a criminal investigation, particularly since "customers have no standing to object to subpoenas requiring their bank to produce records of the customers' accounts," *Harris* v. *United States*, 413 F.2d 316, 318 (9th Cir. 1969) (citing numerous cases). And there is no question that the records could be checked as a matter of routine by the Internal Revenue Service.[9] Indeed, since USSF was a tax-exempt corporation, it must have filed federal tax returns listing contributions over $5000 and the names and addresses of its contributors.[10]

Thus, the position of the USSF corporation is that although it must disclose—and to a certain extent doubtless already has disclosed—information regarding its contributions to the Executive Branch, nevertheless the bank's records should not be revealed to Congress. As we argued in our Petition, there is no reason why Congress, in properly pursuing its constitutional fact-finding function, should be barred from enforcing its subpoena for these materials, which are owned by the bank. Respondents cannot clothe the bank's records with immunity from discovery merely by labeling them the "functional equivalent of membership lists."

[9] See Section 7602 of the Internal Rev. Code, 26 U.S.C. 7602; see also *Donaldson* v. *United States*, 400 U.S. 517, 523 (1971).

[10] See Treas. Reg. 1.6033-2(a)(2)(ii)(f) (1974) (on its annual information return, the tax exempt organization must list "The total of the contributions, gifts, grants and similar amounts received by it during the taxable year, and the names and addresses of all persons who contributed, bequeathed, or devised $5,000 or more (in money or other property) during the taxable year.")

4. Respondents also assert that there is no "live case" here because the subpoenas are now four years old.[11] The age of the subpoenas only confirms the point we made in our Petition (p. 12) that the decision below, by inviting persons and organizations to come into court and halt Congressional investigations while the case winds its way to final judgment, "will open the doors to lawsuits that could cripple the process of legislative inquiry." Here respondents' frustration of the legislative process for four years surely is no reason for this Court to deny certiorari. Indeed, it is a compelling reason for the Court to grant the Petition.

The continuing concern of the Congressional defendants about the implications of the decision below is clear from the fact that they have sought review in this Court. There is nothing in the record to indicate that the investigation of USSF would be abandoned if the material sought from the bank were turned over.

Respondents assert that since petitioners' counsel called to ask whether USSF was still functioning, this shows that Congress is no longer interested in the investigation. Respondents' reference to matters not of record is, of course, highly inappropriate. We are, however, constrained to respond by noting that petitioners' counsel called USSF's attorney only after being told by the Senate Subcommittee that USSF was still alive and that his inquiry was made simply out of an abundance of caution.[12]

[11] Brief in Opposition, pp. 19A-20.

[12] Respondents also argue that the House Committee cases are moot because the subpoenas are four years old, the Session of Congress has expired, and the House is not a continuing body.

Curiously, respondents did not present this argument to the court of appeals, although it was equally applicable at that time. We suggest that if respondents are correct, the proper course is for this Court to vacate as moot the judgment below insofar as it relates to the House Committee cases. This disposition would of course not affect the USSF case.

In any event, we do not believe the House Committee cases are moot. The Committee would have been flouting the Judiciary if it had repeatedly reissued subpoenas with respect to which preliminary injunctions had been entered (see Pet., at p. 8, n.6).

In short, this case is very much alive and its implications for the future are a matter of grave concern to the petitioners. The petition for a writ of certiorari should be granted.

Respectfully submitted.

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